PP

v.

MD SARIP SALLEH & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CRIMINAL APPEAL NO: 42S-90-07-2012]
11 NOVEMBER 2013

UNINCORPORATED ASSOCIATIONS: *Societies - Co-operative society - Offences under ss. 10A & 45(1) Co-operative Societies Act 1993 - Holding out as registered co-operative society - Whether elements of 'holding out' proved - Whether respondents present during board meeting - Whether minutes of board meeting reliable - Whether accuracy and veracity of minutes doubtful - Whether respondents exercised prudence and diligence in managing investment schemes - Whether ingredients under ss. 10A & 45(1) proved*

CRIMINAL LAW: *Co-operative Societies Act 1993 - Section 10A - Holding out as registered co-operative society - Whether elements of 'holding out' proved - Whether respondents present during board meeting - Whether minutes of board meeting reliable - Whether accuracy and veracity of minutes doubtful - Whether prosecution made out prima facie case*

CRIMINAL LAW: *Co-operative Societies Act 1993 - Section 45(1) - Liability of members of Board - Failure to exercise prudence and diligence in managing investment schemes - Payment of dividends to investors when no profits made - Allegation of - Whether proved - Whether losses sustained - Whether prosecution made out prima facie case*

The respondents were charged separately before the Sessions Court for an offence under s. 10A of the Co-operative Societies Act 1993 ('the Act') and two offences under s. 45(1) of the Act. The first charge was in respect of their holding out as a co-operative society to the employees of the Koperasi Pelaburan Hartanah Berhad ('KOPRAHA'). As for the second and third charges, it was contended that the respondents had failed to exercise prudence and diligence in managing the financial affairs of KOPRAHA. The Sessions Court Judge ('SCJ') ruled that the prosecution had failed to make out a *prima facie* case on the first

charge. As for the second and third charges, the SCJ was of the view that the prosecution had failed to prove that the respondents had failed to exercise prudence and diligence in managing the investment schemes known as 'Units @ Neocyber' and 'Gold Members'. Dissatisfied, the appellant appealed. The appellant submitted, *inter alia*, that (i) the prosecution had made out a *prima facie* case when it had proved that the respondents had held themselves out as a registered co-operative to the employees of KOPRAHA by carrying on business as a registered co-operative; (ii) the respondents had held a Board of Directors' meeting where the meeting had approved matters relating to the running of the co-operative such as the acceptance of loans and deposits; (iii) the respondents had held themselves out as a co-operative by approving the acceptance of RM500,000 as loans from the members of KOPRAHA; (iv) the loan was received on 29 April 2008 but KOPRAHA was only registered on 10 June 2008; (v) KOPRAHA was making losses; and (vi) the decision to pay dividends to the investors at a time when KOPRAHA had yet to make profits was not a prudent or diligent act and as such, the respondents, as members of the Board, were jointly and severally liable. The court would deal with the appeal from the viewpoint of: (i) the first charge under s. 10A of the Act; and (ii) the second and third charges under s. 45(1) of the Act.

Held (dismissing appeal; affirming decision of Sessions Court):

(1) Section 34 of the Penal Code had not been invoked. In the circumstances, the appellant would have to prove that the respondents had committed the actions as set out in the charge *ie*, that the respondents had held themselves out as a registered co-operative to the employees of KOPRAHA by carrying on business as a registered co-operative. (paras 10 & 33)

(2) The minutes of meeting ('P23') dated 5 April 2008 showed that the Board had agreed that KOPRAHA needed RM50,000 as start-up capital for the next three months and had 'bersetuju dan memutuskan untuk memohon pinjaman keutamaan di kalangan ahli KOPRAHA', in the absence of the first respondent. On the other hand, the minutes of the Board of Directors' meeting ('P24') dated 4 May 2008 attended by

both the respondents showed that P23 was read and the second respondent proposed that it be passed, and this was seconded by the first respondent. It could not be gainsaid that in light of the absence of the first respondent at the previous meeting, he could not have made the proposal for the minutes to be passed or even to second the motion. Based on the minutes, the first respondent's attendance at the subsequent Board meeting was insufficient to denote and prove that he was guilty of the act of holding out as co-operative. (paras 33, 35 & 36)

(3) The SCJ was not in error in finding that the prosecution had failed to make out a *prima facie* case on the first charge in a situation where the appellant relied on the evidence of the minutes of the Board which accuracy and veracity was in doubt. Even if this court was in error regarding the doubtful nature of the accuracy of the minutes, the respondents could not have held out to the Pengurus Kanan that KOPRAHA was a registered co-operative as he was aware that KOPRAHA was still in the process of registration. (para 41)

(4) Based on the evidence adduced that there were returns from the Neocyber investment, the issue as to whether the Board and the respondents had acted prudently and diligently by paying out dividends 'walaupun ... Koperasi masih belum menjana pendapatan' as stated in the second charge was not so clear. In the case of Neocyber investment, there were returns whereas for the Gold Members' investment, there were no returns. However, the evidence adduced from the prosecution's witnesses pointed to the fact that no dividends were paid, because they were not yet due. (para 57)

(5) The SCJ was not in error when she found that the appellant had failed to make out a *prima facie* case against the respondents on the second and third charges. The appellant had failed to adduce sufficient and unambiguous evidence as regards to the actual working of the two investment schemes, if indeed both could be called as investment schemes. By failing to show succinctly how the two investment schemes worked, the appellant was unable to prove that the payment of dividends for the Neocyber investment amounted to a failure to exercise prudence or diligence. (para 59)

(6) In respect of the third charge, there was no evidence that dividends were paid out to the investors of the Gold Members' investment because the dividends were not yet due at the time when KOPRAHA's operations were frozen. As such, the question as to whether it would have been able to meet its dividend obligations remained an unanswered question. (para 60)

(7) The activities of KOPRAHA did appear to be suspicious. However, suspicion was not a substitute for proof. To establish an offence under s. 45(1) of the Act for failure to exercise due prudence and negligence in managing the affairs of KOPRAHA, there must be some evidence that the investment scheme was perhaps not viable, or that the payment of dividends from the returns before an audit was made of its accounts was not viable, or that KOPRAHA had misused or dissipated the monies collected from the investors not to invest in assets so as to gain returns but for rental of offices and payments of fees to directors. If that was the position taken by the prosecution, then the charges must also be framed properly to reflect its case. (para 61)

Legislation referred to:
Co-operative Societies Act 1993, ss. 10A(1), 45(1)
Penal Code, s. 34

Other source(s) referred to:
Walter Woon, *Company Law,* 2nd edn, p 204

For the prosecution - Hanim Abdul Rahman (Syahriah Shapiee with her) DPPs
For the respondents - Amer Hamzah Arshad (Melissa Sasidaran with him); M/s Ranjit Singh & Yeoh

Reported by Kumitha Abd Majid

JUDGMENT

Amelia Tee Abdullah J:

[1] The respondents, Md Sarip bin Salleh ("the 1st respondent') and Lee Wei Onn ("the 2nd respondent"), were charged separately before the Sessions Court, Kuala Lumpur with an

offence under s. 10A of the Co-operative Societies Act 1993 ("the Act") and two (2) offences under s. 45(1) of the Act. On 10 July 2012, at the close of the prosecution case, the learned Sessions Court Judge ("HMS") had acquitted and discharged the respondents on all charges without calling on them to enter their defence.

[2] Being dissatisfied with the learned HMS's order of acquittal and discharge on all three charges, the Public Prosecutor has filed an appeal against the order of acquittal and discharge.

[3] The charges against the first respondent reads as follows:

Pertuduhan Pertama

Bahawa kamu, dari 5 April 2008 hingga 23hb Mei 2008 di Tingkat Ground, 1 dan 2, Blok A, Setiawangsa Business Suites, Jalan Setiawangsa 11, Taman Setiawangsa, dalam daerah Kuala Lumpur di dalam negeri Wilayah Persekutuan, telah mengemukakan diri sebagai koperasi kepada pekerja Koperasi Pelaburan Hartanah Berhad dengan mengadakan satu mesyuarat lembaga pengarah Koperasi Pelaburan Hartanah Berhad pada 4 Mei 2008 dan telah memutuskan menerima pinjaman dari bakal anggota koperasi sebanyak RM500,000.00 dan dimasukkan ke dalam akaun sementara Koperasi atas nama Nakiwa M&S Sdn Bhd (No. Syarikat: 216733-V) bernombor 10-026-015735-0 di Affin Bank Berhad iaitu bagi tujuan pembayaran modal kerja permulaan koperasi dengan menggunakan baucer bayaran atas nama Koperasi Pelaburan Hartanah Berhad seperti di lampiran sebelum Koperasi Pelaburan Hartanah Berhad didaftarkan secara sah dan oleh itu telah melakukan kesalahan di bawah Seksyen 10A (1) Akta Koperasi 1993 (Akta 502) dan boleh dihukum di bawah seksyen 10A (2) Akta yang sama.

Pertuduhan Kedua

Bahawa kamu, dari 13 Ogos 2008 hingga 6 Mac 2009 sebagai anggota Lembaga Koperasi Pelaburan Hartanah Berhad (No. Pendaftaran Koperasi: W-6-0438) (Koperasi) di Tingkat Ground, 1 dan 2, Blok A, Setiawangsa Business Suites, Jalan Setiawangsa 11, Taman Setiawangsa, dalam daerah Kuala Lumpur di dalam negeri Wilayah Persekutuan, telah tidak berhemat dan bertekun dalam menguruskan kewangan Koperasi dengan menjalankan kutipan pelaburan berjumlah RM1,206,000.00 daripada anggota Koperasi melalui pelaburan Units@Neocyber yang membayar dividend sehingga 16% setahun walaupun akaun Koperasi masih

belum diaudit dan Koperasi masih belum menjana pendapatan yang menyebabkan kerugian kepada pelabur apabila Koperasi tidak membayar dividend yang dijanjikan dan seterusnya menyebabkan pelabur kehilangan modal pelaburan seperti di lampiran dan oleh itu telah melakukan suatu kesalahan di bawah Seksyen 45(1) Akta Koperasi 1993 (Akta 502) dan boleh dihukum di bawah seksyen 45(4) Akta yang sama.

Pertuduhan Ketiga

Bahawa kamu, dari 13 Ogos 2008 hingga 6 Mac 2009 sebagai anggota Lembaga Koperasi Pelaburan Hartanah Berhad (No. Pendaftaran Koperasi: W-6-0438) (Koperasi) di Tingkat Ground, 1 dan 2, Blok A, Setiawangsa Business Suites, Jalan Setiawangsa 11, Taman Setiawangsa, dalam daerah Kuala Lumpur di dalam negeri Wilayah Persekutuan, telah tidak berhemat dan bertekun dalam menguruskan kewangan Koperasi dengan menjalankan kutipan pelaburan berjumlah RM 1,239,750.00 daripada anggota Koperasi melalui pelaburan "Gold Members" yang membayar dividend sehingga 15% setahun walaupun akaun Koperasi masih belum diaudit dan Koperasi masih belum menjana pendapatan yang menyebabkan kerugian kepada pelabur apabila Koperasi tidak membayar dividend yang dijanjikan dan seterusnya menyebabkan pelabur kehilangan modal pelaburan seperti di lampiran dan oleh itu telah melakukan suatu kesalahan di bawah Seksyen 45(1) Akta Koperasi 1993 (Akta 502) dan boleh dihukum di bawah seksyen 45 (4) Akta yang sama.

[4] The first charge against the second respondent, which differs slightly from that against the first respondent, reads as follows:

Pertuduhan Pertama

Bahawa kamu, dari 5 April 2008 hingga 23hb Mei 2008 di Tingkat Ground, 1 dan 2, Blok A, Setiawangsa Business Suites, Jalan Setiawangsa 11, Taman Setiawangsa, dalam daerah Kuala Lumpur di dalam negeri Wilayah Persekutuan, telah mengemukakan diri sebagai koperasi kepada pekerja Koperasi Pelaburan Hartanah Berhad dengan mengadakan dua mesyuarat lembaga pengarah Koperasi Pelaburan Hartanah Berhad pada 5 April 2008 dan 4 Mei 2008 dan telah memutuskan menerima pinjaman dari bakal anggota koperasi sebanyak RM 500,000-00 dan dimasukkan ke dalam akaun sementara Koperasi atas nama Nakiwa M&S Sdn Bhd (No. Syarikat: 216733-V) bernombor 10-026-015735-0 di Affin Bank Berhad iaitu bagi tujuan pembayaran modal kerja permulaan koperasi dengan menggunakan baucer

> bayaran atas nama Koperasi Pelaburan Hartanah Berhad seperti di lampiran sebelum Koperasi Pelaburan Hartanah Berhad didaftarkan secara sah dan oleh itu telah melakukan kesalahan di bawah Seksyen 10A(1) Akta Koperasi 1993 (Akta 502) dan boleh dihukum di bawah seksyen 10A(2) Akta yang sama.

The second and third charges against the 2nd respondent are similar to the second and third charges against the 1st respondent.

[5] The court will deal with this appeal on two levels, namely:

(i) From the viewpoint of the first charges under s. 10A(1) of the Co-operative Societies Act 1993; and

(ii) From the viewpoint of the second and third charges under s. 45(1) of the Co-operative Societies Act 1993.

Re The First Charge

[6] The first charge against the respondents is in respect of their holding out as a co-operative society to the employees of the Koperasi Pelaburan Hartanah Berhad ("KOPRAHA"). In respect of the 1st respondent, he is alleged to have held a meeting of the board of directors of KOPRAHA on 4 May 2008 and had made a decision to accept a loan of RM 500,000 from the prospective members of KOPRAHA for the purpose of its working capital. The 2nd respondent was alleged to have held two meetings of the board of directors of KOPRAHA, on 5 April 2008 and 24 May 2008, for the same purpose. The monies accepted as a loan were deposited into a temporary account of KOPRAHA under the name of Nakiwa M&S Sdn Bhd with Affin Bank Berhad.

[7] In respect of the first charge against the respondents, the offence is under s. 10A(1) of the Co-operative Societies Act 1993 which reads as follows:

> No person shall hold himself out as a co-operative society, or represent that he or any other person is carrying on the business of a co-operative society in any form or manner unless he or such other person, as the case may be, is registered under this Act.

[8] Flowing from the provisions of s. 10A, it can be seen that the ingredients of the offence to be proved are as follows:

A (i) That the respondents had held themselves out as a co-operative society; or

(ii) That the respondents had represented that they or any other person is carrying on the business of a co-operative society; and

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(iii) The co-operative society has yet to be registered under the Act.

The HMS's Grounds

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[9] In her grounds of judgment, the learned Hakim Mahkamah Sesyen ("HMS") was of the view that the prosecution had failed to make out a *prima facie* case on the first charge for the following reasons:

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(i) The prosecution had failed to prove the element of 'holding out". The learned HMS questions who were the employees of KOPRAHA mentioned in the charge to whom the respondents were alleged to have held out. Another question raised was in relation to the "bakal anggota koperasi" mentioned in the charge who were alleged to have given the loan of RM500,000 to KOPRAHA. Although three names were stated, however Dato' Nabil bin Abdul Kadir, Sakinah binti Zainul Abidin and Nurhayati binti Abdullah were not called as witnesses.

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(ii) The evidence adduced shows that KOPRAHA had received loans from the three (3) individuals, namely Dato' Nabil bin Abdul Kadir, Sakinah binti Zainul Abidin and Nurhayati binti Abdullah as start-up capital for KOPRAHA's operations during the Board Meetings as seen in Minutes P23 and P24. Dato' Nabil bin Abdul Kadir was the Chairman and a Director at the said Meetings as well as the Executive Director of Nakiwa M&S Sdn Bhd, Datin Sakinah binti Zainul Abidin is his wife and the owner and director of Nakiwa. The offices of KOPRAHA at Tingkat Ground, 1 dan 2, Blok A, Setiawangsa Business Suites, Jalan Setiawangsa 11, Taman Setiawangsa, Kuala Lumpur is at a building which is owned by Dato' Nabil and his wife. The evidence of the prosecution's witnesses PW6 and PW7 shows that Dato' Nabil played a key role in the

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decisions which were arrived at during the Board Meetings. Any objections that were voiced by other Board members were not recorded in the Minutes of Meeting. Based on the evidence of PW2 and PW7, there was a possibility that the decision taken to receive the loan of RM500,000 was a decision which was made by Dato' Nabil for his own interests and was not a joint decision of the two accused persons. As the veracity of the Board Minutes were doubtful, the learned HMS found that s. 10A of the Act was not proved.

The Appellant's Submissions

[10] The appellant contends that the prosecution had made out a *prima facie* case against the respondents at the close of the prosecution case when it had proved that the respondents had held themselves out as a registered co-operative to the employees of KOPRAHA by carrying on business as a registered co-operative. They had, *inter alia*, held a board of directors' meeting on 4 May 2008 where the meeting had approved matters relating to the running of the co-operative such as the acceptance of loans and deposits.

[11] Following the decisions made by the board on 4 May 2008, the pengurus kanan of KOPRAHA, Encik Ahmad Fairuz Farok, based on his belief that KOPRAHA was entitled to accept the loan of RM500,000, had proceeded to carry out the business of the co-operative by paying out allowances to the board of directors. The first respondent was paid RM1,700 (P32) whilst the second respondent was paid RM3,200 (P31) as allowances for the month of April 2008.

[12] The appellant submits that the respondents had held themselves out as a co-operative by approving the acceptance of RM500,000 as loans from the members of KOPRAHA. The loan was received on 29 April 2008 but KOPRAHA was only registered on 10 June 2008 (P5). The appellant thus submits that the loan was received by KOPRAHA before it was registered as a co-operative, that the respondents were members of the board of directors of the co-operative who were involved in, and responsible for, the acceptance of the loan. It was also pointed out that Khairil Anuar bin Mustapha (PW4), a manager with Affin Bank Berhad, had confirmed the opening of the account under

A Nakiwa M&S Sdn Bhd and the deposit of the amounts RM55,000, RM30,000 and RM415,000 totalling RM500,000 into the said account.

[13] As such, the appellant submits that the learned HMS was
B in error when she found that:

(i) The evidence of PW2 and PW7 shows that the decision to accept the RM500,000 was the decision of Dato' Nabil Abdul Kadir and not a joint decision with the respondents;

C (ii) The respondents' agreement was doubted as the Minutes of Meeting did not reveal that the respondents had approved the previous Minutes; and

(iii) The contents of the Minutes of the Board Meetings on
D 5 April 2008 and 4 May 2008 were doubtful.

Issue (i)

[14] On the first issue, the appellant submits that the learned HMS had erred in finding that PW2 and PW7's evidence as to
E the decision to accept the loan of RM500,000 was made by Dato' Nabil Abdul Kadir and not the board (which included the respondents). The appellant relies on the minutes of the board of directors meeting (Bil. 03/2008) held on 4 May 2008 (P24) where at item 1.0 it was recorded that Lee Wei Onn (the 2nd
F respondent) had proposed for the minutes of the second board of directors meeting to be approved and that the proposal was supported by Md Sarip bin Salleh (the 1st respondent) with a few minor amendments.

G **[15]** A further look at item 3.2 of P24 would show that it is recorded that KOPRAHA had received a loan of RM500,000 as at 30 April 2008 and that its expenditure amounted to RM90,003 thus leaving a balance of RM409,997.

H **[16]** As such, the appellants submit that the decisions arrived at by the board of directors at the two meetings were the joint decision of the directors who were present at board of directors meetings and NOT the sole decision of Dato' Nabil Abdul Kadir.

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Issue (ii)

[17] On this issue that the consent or agreement of the respondents were in doubt, the appellant submits that the chairman had "membacakan minit Mesyuarat Lembaga Pengarah Bil 02 untuk disahkan" and that it was the second respondent who had proposed for the minutes to be passed. His proposal was supported by the first respondent with only two minor amendments.

[18] Based on this, the appellant submits that the respondents had approved the minutes of the board of directors meeting Bil. 02/2008. The appellant states that the fact that the first respondent had not attended previous board meetings is irrelevant because "tindakan OKT tersebut hanyalah menyokong cadangan OKT LEE WEI ONN untuk meluluskan minit terdahulu."

Issue (iii)

[19] This issue relates to whether the contents of the board of directors meetings Bil. 02/2008 dated 5 April 2008 and Bil.03/2008 dated 4 May 2008 were doubtful. The appellant refers to the evidence of PW7 – Ismail bin Ali who was involved in the initial establishment of KOPRAHA and a former board member before it was registered. PW7 had resigned from his position before the registration of KOPRAHA. According to PW7, he had objected to the proposal that was discussed during the meeting on 5 April 2008 but that his opposition and objections were not recorded.

[20] The learned Deputy Public Prosecutor has submitted that the failure to record PW7's objections does not mean that the whole of the minutes comes into doubt. Attention is drawn to the fact that PW7 had confirmed, after looking at the minutes of 5 April 2008 (P23) that "inilah keputusan yang dicatit dalam mesyuarat tersebut".

[21] As regards the minutes of 4 May 2008 (P24), there is the evidence of Siti Zunaidah binti Amir ("PW6") to the effect that she was present during the three board of directors' meetings, that she recorded the minutes of the said meetings and that the contents of the minutes were recorded by her based on what was discussed during the said meetings.

[22] Based on the foregoing, the appellant submits that as far as the first charges against both the respondents are concerned, the appellant had succeeded in making out a *prima facie* case against them for a charge under s. 10A(1) of the Co-operative Societies Act 1993 and that they should therefore be called upon by the court to enter upon their defences.

The Respondents' Submissions

[23] The position that has been taken by the respondent is that for an offence of "holding out" as a co-operative under s. 10A(1) of the Act, the prosecution would have to prove:

(i) a positive act from the respondents to a third person which had caused the third person to believe in what was said and done by the respondents;

(ii) there was reliance by the third party in the "holding out" or representation of the respondents; and

(iii) the respondents knew that what was said or done was wrong.

[24] In this case, the appellants' case is that the respondents had convened board meetings and approved the decision to accept the loans. The question that arises is whether such acts were sufficient to constitute the offence of "holding out".

[25] The respondents submit that the appellants had relied on two board of directors meetings dated 5 April 2008 (P23) & 4 May 2008 (P24) to prove its case. However, the respondents submit that such evidence is a weak form of evidence due to the possibilities of the minutes being inaccurate. In this context, reliance was made to Walter Woon, *Company Law*, 2nd edn., p. 204 which states as follows:

> The minutes of meetings are not exclusive evidence of what occurred. It is notorious that minutes of general meetings do not record everything that occurred. Evidence may be led to show that certain matters were not recorded in the minutes. A member who has attended a meeting presumably may give evidence that the minutes do not adequately record what occurred at the meeting. No one can stop him making a written note of the proceedings, to be used later as *aide memoire*.

[26] The respondents submit that looking at the evidence of Encik Ismail bin Ali ("PW7") to the effect that:

(i) He was present at the meeting on 5 April 2008. Those attending the meeting were Dato' Nabil, En. Saiful Bakri Abdullah, En. Lee Wei Onn, PW7 himself, Encik Ahmad Fairuz Farok and Cik Siti Zunaidah Amir;

(ii) In respect of item 3.7, the Board of KOPRAHA had agreed to receive loans from its members. PW7 agreed with the suggestion that the proposal to receive loans for KOPRAHA's initial working capital was suggested and proposed by Dato' Nabil himself;

(iii) Although PW7 did not agree with the suggestion, his opposition was not reflected in para. 3.7 of the Minutes (P23). As such, he agreed with the suggestion that sub-paras. 1 and 2 of para. 3.7 of P23 was inaccurate and misleading;

(iv) The terms of the loan and the calculation and formula for the interest payments were proposed by Dato' Nabil himself;

(v) During the meeting on 5 April 2008, PW7 had an argument with Dato' Nabil but this argument was not reflected in the Minutes. As such, he agreed with the suggestion that the Minutes (P23) were lob-sided and reflected only what was favourable to Dato' Nabil.

[27] Based on the foregoing, the respondents submit that the minutes of meeting (P23 & P24) were inaccurate especially in respect of the proposal/decision to accept loans from the members of KOPRAHA.

[28] Learned counsel for the respondents has also disputed the submissions of the appellant that there was no challenge to the evidence of PW6 as the 'pencatat minit mesyuarat'. It is submitted that the respondents had cross-examined PW6 as to the accuracy of the minutes. She was asked about the objections that were raised by the respondents during those meetings but she was uncertain as to whether or not there were objections raised by the respondents during those meetings. Based on her uncertainty, it is suggested that PW6, who had not kept any contemporaneous notes of the meetings, was an unreliable witness.

[29] An issue arises as to what can legally be done by a co-operative society prior to its registration. Based on the evidence of PW7 as well as Encik Che Wahid bin Mohamed Noor (PW13), it was established that:

(i) A board of directors can be appointed after the Mesyuarat Agong Permulaan; and

(ii) The board is allowed to discuss the business, policy and economic planning of the co-operative society prior to its registration;

[30] As such, learned counsel for the respondents submit that based on the way the charge is framed, the respondents had not committed any offence under s. 10A because the acts of convening meetings and discussing matters arising in meetings was something that was permitted under the law.

[31] The respondents have also submitted on the failure of the prosecution to call essential witnesses namely Dato' Nabil as well as the two other persons whose names are stated in the Annexure to the first charge, namely Sakinah binti Zainul Abidin and Norhayati binti Abdullah.

[32] One final issue raised by the respondents is in relation to the failure of the appellants to invoke s. 34 of the Penal Code in the charge. In light of the failure to do so, the appellants would have to prove that the respondents committed the acts as stated in the charge, and no reliance can be placed on the actions of Dato' Nabil to link the respondents to Dato' Nabil's actions.

Findings Re The First Charge Against The Respondents

[33] From a reading of the first charges against the respondents, the court agrees with learned counsel for the respondents that s. 34 of the Penal Code had not been invoked. This has been confirmed by the learned deputy in her submissions in reply wherein she had stated that s. 34 of the Penal Code is not applicable in this case and action against the board of directors were taken against the respondents in their individual capacity as board members in approving the loan. In the circumstances, the court is in agreement with learned counsel for the respondents that the appellant would then have to prove that the respondents had indeed committed the actions as set out in the charge.

[34] In this case, it is clear that the appellants had relied on the minutes of the board of directors' meetings of 5 April 2008 (P23) and 4 May 2008 (P24) to prove that the respondents were involved in the decision taken to receive the loan of RM500,000. The court has therefore scrutinised the two sets of minutes relied on by the appellants in order to ascertain what is stated therein.

[35] As regards the board of directors' meeting of 5 April 2008 (P23), the court notes that the first respondent was not present on that date although the second respondent was listed as one of the attendees. The minutes shows that the first respondent was absent with apologies. Thus, whilst the minutes would show that the board had agreed that KOPRAHA needed RM500,000 as start-up capital for the next three months and had "bersetuju dan memutuskan untuk memohon pinjaman keutamaan di kalangan ahli KOPRAHA", however the first respondent was not one of the board members who is recorded as having made that decision on 4 May 2008.

[36] The appellant has sought to link the first respondent to the said decision through the minutes of the board of directors' meeting of 4 May 2008 (P24) which both respondents attended. Paragraph 1.0 of the minutes records that after the previous minutes were read, the second respondent had proposed that the minutes be passed and that this was seconded by the first respondent. It cannot be gainsaid that in light of the fact that the first respondent was absent at the previous meeting, he could not have made the proposal for the minutes to be passed or even to second that motion.

[37] The court thus disagrees with the appellant's submission that the fact that the first respondent had not attended previous board meetings is irrelevant because his action was merely to support the second respondent's proposal. The court confesses to an inability to comprehend how support for the passing of the minutes of a meeting (which he did not attend) could amount to a positive act of support for a proposal to acquire a loan from amongst the members of KOPRAHA.

[38] The court notes that para. 3.2 of P24 records that "KOPRAHA telah menerima pinjaman dari ahli berjumlah RM500,000 setakat 30 April 2008". Since the decision to "memohon pinjaman" was made on 5 April 2008 and RM500,000 was recorded as having been received as at 30 April 2008, it follows therefrom that the loan of RM500,000 was taken and received between 5 April 2008 and 30 April 2008, before the board of directors' meeting on 4 May 2008. Based on the above accounting, the court is unable to see how the first respondent's subsequent attendance at 4 May 2008 board meeting is sufficient to denote and prove that he is guilty of the act of holding out as a co-operative.

[39] In this case, the appellants had relied on the minutes of meetings (P23 & P24) to prove the offences that were alleged to be committed by the respondents. Both the learned Deputy Public Prosecutors as well as learned counsel for the respondents have turned to law dictionaries to decipher the meaning of the term "holding out". From *Black's Law Dictionary*, 7th edn. relied on by the respondent and *Osborne's Concise Law Dictionary*, 7th edn. relied on by the learned deputy, the court deciphers that a person holds himself out when he represents himself as having a certain capacity to a third party who has acted upon that representation.

[40] In this case, a question was posed to the learned Deputy Public Prosecutors as regards the identity of the "pekerja Koperasi Pelaburan Hartanah Berhad" to whom the respondents are alleged to have held out. The answer was that it was the pengurus kanan Koperasi who had acted on the decision reached to accept the loan by making payments in the name of Koperasi Pelaburan Hartanah Berhad. In line with this situation, the court has arrived at the following findings:

(i) Encik Ahmad Fairuz Farok, the pengurus kanan KOPRAHA, was present at the board meeting on 5 April 2008 where at para. 3.7 the meeting was informed about KOPRAHA's lack of capital at that time. Expenses at that time were being advanced by Dato' Nabil as the executive chairman. Expenses for the next four months was estimated at RM500,000. However, it is the third paragraph which is most telling:

KOPRAHA tidak mampu membuat pinjaman bank dan juga tidak mampu memohon bantuan daripada Suruhanjaya Koperasi Malaysia (SKM) kerana KOPRAHA sedang dalam proses pendaftaran dengan SKM. (emphasis added)

Based on the above, the court finds that Encik Ahmad Fairuz Farok, the pengurus kanan KOPRAHA, who was present at the board meeting, was informed, and would thus be aware of the status of KOPRAHA as a co-operative that was still in the process of registration. The court thus questions whether the respondents could conceivably have held out to the pengurus kanan that KOPRAHA was a registered co-operative;

(ii) In light of the totality of the evidence of PW6 and PW7, the court finds that the veracity and accuracy of the Minutes recorded to be extremely doubtful. Although PW7 was not able to produce written notes of the proceedings taken by him, nor was he certain as to what others at the Board meeting may have done, however, he was certain as to the fact that he did not agree with para. 3.7 as regards the loan to be taken for the initial working capital. However, not only was PW7's objections not recorded in the minutes (P23) but it was even recorded that "... Lembaga Pengarah telah bersetuju sebulat suara memerlukan modal kerja permulaan sebanyak RM500,000 bagi tempoh perbelanjaan sehingga empat bulan akan datang" dan "... Lembaga Pengarah bersetuju dan memutuskan untuk memohon pinjaman keutamaan di kalangan ahli KOPRAHA". As such, PW7 who was present at the board meeting on 5 April 2008 had testified that the said minutes were not accurate and did not reflect what had actually transpired at the meeting. The court thus finds that the accuracy of the minutes of the board meetings to be doubtful and not to be relied upon.

[41] In this case, the appellant had relied on the evidence of the board minutes to prove the actions of the respondents. In a situation such as this where the accuracy and veracity of the board minutes is in doubt, the court is of the considered view that the learned HMS was not in error when she found that the prosecution had failed to make out a *prima facie* case against the respondents on the first charge. And even if this court is in error

regarding the doubtful nature of the accuracy of the minutes, the court further finds that the respondents could not have held out to pengurus kanan that KOPRAHA is a registered co-operative as the said pengurus kanan was aware that KOPRAHA was still in the process of registration.

Re The Second And Third Charges

[42] The second and third charges against the respondents is in relation to offences under s. 45(1) of the Co-operative Societies Act 1993 ("the Act") in failing to exercise prudence and diligence in managing the financial affairs of KOPRAHA. The second charge is in relation to investments in the scheme known as "Units@Neocyber" amounting to RM1,206,000 whereas the third charge relates to investments in the scheme known as "Gold Members" amounting to RM1,239,750.

[43] The second and third charges against the respondents are in respect of offences under s. 45 of the Co-operative Societies Act 1993 which reads as follows:

> 45(1) In the conduct of the affairs of a co-operative society, the members of the Board of such co-operative society shall exercise the prudence and diligence of ordinary men of business and shall be jointly and severally liable for any loss sustained through failure to exercise such prudence and diligence or through any act which is contrary to the provisions of this Act, the regulations, orders or the by-laws of such co-operative society or the direction of its general meeting.

[44] As such, the ingredients to be proved by the appellant for an offence under s. 45(1) of the Act are as follows:

(i) That the respondents, as Board members, had failed to exercise prudence and diligence in the conduct of the affairs of KOPRAHA; or

(ii) The respondents, as members of the Board of Directors, had committed an act which is contrary to the provisions of the Act, the regulations, orders or the by-laws of KOPRAHA or the direction of its general meeting; and

(iii) The failure to exercise due prudence and diligence or the act committed which was contrary to the provisions of the Act, regulations etc. had caused KOPRAHA to incur loss.

The HMS's Grounds

[45] In her grounds of judgment, the learned HMS was of the view that the prosecution had failed to prove that the respondents had failed to exercise prudence and diligence in managing the Units@Neocyber and the Gold Members investments schemes. The learned HMS had based her finding on the following reasons:

(i) The Neocyber and Gold Members Investment projects had just commenced and were still in its infancy stage. As such, it was reasonable that the profits promised could not as yet be fulfilled. The prosecution had only adduced evidence as regards the existence of these two projects which had promised profits to their investors. However, there was no evidence as to the internal workings of these two schemes as the witnesses relied on by the prosecution (PW12 & PW16) had no clear knowledge about the matter;

(ii) There was no clear evidence to show the purpose of the sums collected from the investors, the status of the projects or the losses that were incurred by KOPRAHA;

(iii) The prosecution had failed to prove the amount of loss that had been incurred by KOPRAHA and that the amount of monies in KOPRAHA's account was insufficient in order to prove that it was unable to make the promised returns to the investors of the two schemes.

The Appellant's Submissions

[46] In respect of ground (i), the appellant submits that the learned HMS had failed to consider the evidence of Encik Zainul Mujahdin bin Omar (PW9) who is the senior executive of investment and banking; investors Encik Mohd Roslan bin Hasim ("PW11") and Mustafa bin Abdul Razak (PW10), and Nilawati binti Ramli ("PW12"), the financial officer and admin executive of KOPRAHA.

[47] In relation to ground (ii), the appellants submit that the learned HMS had failed to consider the evidence of PW12 that as the accounts executive, she had managed the payment of dividends to the investors of Neocyber although she testified that no dividends were paid out to the investors of Gold Members.

[48] In respect of ground (iii), the appellant submits that the learned HMS:

(i) Had failed to consider the evidence of PW12 as regards the document entitled "Return on Profit Investment Distribution" (P57) which lists out the names of the investors who had been paid dividends. Payments were made in respect of the Neocyber investment commencing from November 2008 until May 2009;

(ii) The manner of payment of dividends was through credit into the investors' accounts. Dividends were paid from the investors' own monies. Although KOPRAHA had purchased eight (8) units of apartments before PW12 left, however all eight units had yet to be rented out and, as such, there were no returns from the units of apartments purchased. As such, she testified that the dividends which were paid out to the investors were NOT returns from profits made *vide* the Neocyber investment scheme. Further there was evidence that monies received from the Gold Members investment scheme was also used to purchase apartments in the Neocyber investment scheme, for operational expenses, as well as to pay dividends to investors;

(iii) KOPRAHA had not made any profits at the time when it paid out dividends. On the contrary, it was making losses. The investors too made losses when there were no more dividend payments in 2009;

(iv) According to an investor in Units@Neocyber, Mohd Ruslan bin Hashim (PW11), he had invested a total of RM14,000 between 16 September 2008 and 1 December 2008. He was promised dividends of 16% per annum to be paid quarterly. However, he had only received four payments of RM80, RM160, RM80 and RM160 which were credited into his account;

(v) Investors had suffered losses when they failed to recover the sums that they had invested;

(vi) The act of paying dividends to investors before KOPRAHA had made any profits from the rental of the eight units of apartments was contrary to the regulations which state that returns or "pulangan" means a share of the profits from the investment.

[49] The appellant has also drawn the court's attention to the provisions of s. 45(1) of the Act which states that "the members of the Board … shall be jointly and severally liable for any loss sustained through failure to exercise such prudence and diligence …" The appellant submits that the decision to pay dividends to the investors at a time when KOPRAHA had yet to make profits was not a prudent or diligent act and that as such, the respondents, as members of the board, are jointly and severally liable.

The Respondents' Submissions

[50] In response, learned counsel for the respondents has submitted that the appellants had, in the first instance, failed to establish what was the nature and scope of the investments named in the second and third charges, namely the Units@Neocyber investment and the Gold Members investment. The respondents submit that the only person who had first-hand information about the Neocyber investment is Encik Suhaimi who was not called as a witness by the prosecution. According to Nor Azahani binti Abu Bakar ("PW16"), Encik Suhaimi was the supervisor of the Neocyber project and a director of KOPRAHA. PW12, who was relied on by the appellants to testify about the payments which were made to investors had admitted in court that she was not the person responsible for managing the Neocyber investment. Through cross-examination, it had been shown that her evidence in respect of the Neocyber investment and the non-rental of the apartments that were bought were based on hearsay. With regard to the issue of the rental of the apartments, contrary evidence were given by PW12 and PW16.

[51] Learned counsel for the respondents had also submitted that since no audit was ever conducted in respect of KOPRAHA's investments, the appellant had failed to establish that losses were in fact incurred, the amount of the said losses, or that it was the respondents' failure to exercise prudence and diligence which had given rise to those losses.

[52] With regard to the Gold Members investment, the respondents submit that none of the prosecution's witnesses were able to give proper evidence as to what this investment is. Was it really an investment or "pelaburan" as stated in the third charge or was it a membership? If it was a membership, how did it work to generate dividends or profits?

[53] In relation to the third charge, the respondents argue that unless the prosecution is not able to establish what the Gold Members investment scheme is, it would be unable to prove an offence under s. 45(1) of the Act. The respondents further raises the question as to whether the failure to pay returns under the Gold Members scheme was a result of lack of prudence and diligence of the board, including the respondents, or whether it was because SKM had frozen KOPRAHA's operations.

Findings Re The Second And Third Charges Against The Respondents

[54] In considering the appellant's appeal in respect of the second and third charges against the respondents, the court must confess to no small amount of puzzlement in relation to what these two investment schemes mentioned in the said charges were and how they worked. What is the Units@Neocyber investment mentioned in the second charge? What is the Gold Members investment mentioned in the third charge? How do they work for the investors to generate returns? Whilst the court is able to decipher somewhat vaguely that the Neocyber scheme involves purchase of property by KOPRAHA which property is then rented out to earn income (and hopefully profits), the Gold Members investment remain an enigma right to the end. Despite perusing the evidence of the prosecution witnesses, the court is left without answers as to how it works and whether it is even an investment in the first place.

[55] It cannot be denied that the appellant's argument that the two schemes should never have been allowed to take off in the first place sounds attractive. Any scheme that promises such high dividends to investors at a time before profits or sufficient profits are realised would point to a lack of prudence and diligence on the part of the directors or operators of the scheme. The suggestion through the evidence of witnesses that the dividends paid to the investors of the Neocyber investment came from the monies collected from the investors and not from any profits made from investments would also lend to the suspicion that there was a lack of prudence and diligence here on the part of the directors of KOPRAHA.

[56] However, the court finds that the evidence adduced by the appellant through PW12 that there were no profits or returns at all from investments because none of the properties that were purchased under the Neocyber investment scheme were rented out to be extremely doubtful in light of her evidence that her testimony was based on information that was told to her by the "Unit Pelaburan" which would render her evidence on this issue as hearsay. Apart from the foregoing, PW12's evidence on this issue was contradicted by Nor Azahani binti Abu Bakar (PW16) who was at the material time the pegawai pemasaran and subsequently the pegawai perhubungan awam. It is PW16's evidence that there was rental of the investment's apartments and consequently that there were returns to the investment.

[57] In the face of evidence adduced during the prosecution's case itself that there were returns from the Neocyber investment, the issue as to whether the board and the respondents had acted prudently and diligently by paying out dividends "walaupun … Koperasi masih belum menjana pendapatan" as stated in the second charge become not so clear. In the case of the Neocyber investment, there were returns. In the case of the Gold Members investment, there were no returns, but then again the evidence adduced from the prosecution's witnesses point to the fact that no dividends were paid, as yet, because they were not yet due.

[58] It cannot be gainsaid that at the end of the prosecution's case, the burden of proof rests on the prosecution to make out a *prima facie* case against the respondents on the charges. And to

A determine whether a *prima facie* case has been made out, the court would have to undertake a maximum evaluation of the whole of the evidence adduced by the prosecution's witnesses. The question that the court would have to ask itself is this: Has the prosecution made out a *prima facie* case against the respondents
B which, if unrebutted, would have warranted their convictions? If the court had called on the respondents to enter their defence and if the respondents had elected to remain silent, could the court have convicted them on the charges?

C **[59]** After carefully considering the evidence adduced and the submissions of both parties as well as the grounds of decision of the learned HMS, the court is of the considered view that the learned HMS was not in error when she found that the appellant had failed to make out a *prima facie* case against the respondents
D on the second and third charges. The court finds that the appellant had failed to adduce sufficient and sufficiently clear and unambiguous evidence as regards the actual workings of the two investment schemes, if indeed both can be called investment schemes. By failing to show succinctly how the two investment
E schemes worked, the appellant was unable to prove that the payment of dividends for the Neocyber investment amounted to a failure to exercise prudence or diligence. The court notes that the basic premise of the second charge, namely that KOPRAHA had yet to earn or garner any returns from the Neocyber investment
F scheme would fall in light of evidence adduced during the prosecution case that there was rental of apartments and consequently, there were returns from the investment.

[60] In respect of the third charge, the court finds that there was
G no evidence that dividends were paid out to the investors of the Gold Members investment because the dividends were not yet due at the time when SKM froze KOPRAHA's operations. As such, the question as to whether it would have been able to meet its dividend obligations remains an unanswered question.

H **[61]** The activities of KOPRAHA do appear suspicious. However, suspicion is no substitute for proof. To establish an offence under s. 45(1) of the Act for failure to exercise due prudence and negligence in managing the affairs of KOPRAHA, there must be some evidence that that the investment scheme was perhaps not
I viable, or that the payment of dividends from the returns before

an audit was made of its accounts was not viable, or that KOPRAHA had misused or dissipated the monies collected from the investors not to invest in assets so as to gain returns but for rental of offices and payments of fees to directors. Needless to say, if that is the position taken by the prosecution, the charges must also be properly framed to reflect its case, whatever it may be.

Conclusion

[62] For all the reasons as set out above, the court finds that the learned HMS was not in error when she acquitted and discharged the respondents on all three charges without calling for their defence. Accordingly, the appellant's appeal is hereby dismissed.